

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:UNY:TL-N-6820-99
JFWarner

date: January 6, 2000

to: Chief, Quality Measurement Staff, Upstate New York District
Attn: Dawn DiCarla

from: District Counsel, Buffalo

subject: [REDACTED] - Interest netting per I.R.C. § 6621(d)
Netting between two EINs

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

DISCUSSION

This is in response to your request for our opinion concerning the above-captioned taxpayer. The issue involved is whether netting per I.R.C. § 6621(d) can apply to interest periods between two different taxpayers with two separate EINs.

FACTS

[REDACTED] filed a Form 1120 for tax year [REDACTED] claiming commission expenses.

_____ subsequently filed a Form 1120X claiming additional commission expenses which resulted in a claimed refund of \$_____. This refund has not been processed. _____

_____ filed as a foreign sales company (FSC). Its Form 1120X for the year _____ reported additional commission income which resulted in a tax due in the amount of \$_____. On _____, that amount, in addition to interest, was fully paid. Its account is presently in zero balance. On _____, _____

_____ filed a Form 843 for the tax year _____ claiming interest netting between _____ and _____.

_____ is alleging that this situation falls within the "spirit" of the Conference Committee Report in that "zero net interest rate applies where interest is payable and allowable... that is attributable to a taxpayer's interest in a pass-through entity". _____ claims that although _____ is not a pass-through entity, it is a _____ % owned, related party precluded from filing with _____ by statute. _____ feels that the FSC return is not a "different taxpayer".

_____ also requests clarification of I.R.C. § 6402 as to its effect on these taxpayers had the deficiency of _____ not been paid. The taxpayer anticipates filing additional claims or amended returns between the two EINs for subsequent years and contends that the interest start date is the same for both, and that zero deficiency interest should be charged.

ANALYSIS

Under I.R.C. § 6402(a), the Service can credit an overpayment as long as the person who made the overpayment is also liable for a tax against which the overpayment is to be credited. Generally, a member of a consolidated group is severally liable for the income tax liability of the group. Treas. Reg. § 1.1502-6(a). When a tax is jointly and severally owed by two or more taxpayers, the Service has the authority to collect the full amount of the unpaid tax from any of the liable taxpayers. Further, any interest attributable to the underpayment of the consolidated return tax liability will be computed subject to the provisions of I.R.C. § 6601(f).

I.R.C. § 6621(d) provides that to the extent interest is payable for any period under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer of tax imposed by the Code, the net rate of

interest under Section 6621 on such amount shall be zero for such period.

Pursuant to I.R.C. § 1501, "an affiliated group of corporations shall, subject to the provisions of this chapter, have the privilege of making a consolidated return with respect to the income tax imposed by chapter 1 for the taxable year in lieu of separate returns..." I.R.C. § 1504(a) defines "affiliated group" as one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation..." I.R.C. § 1504(b) defines "includible corporation" as any corporation except a foreign corporation. I.R.C. § 1504(b)(3).

Since [REDACTED], is by statute, not a member of an "affiliated group", it is not a member of a consolidated group for purposes of I.R.C. § 6402(a). As a result, the Service may not credit the overpayment of [REDACTED] to the liabilities of [REDACTED]. Additionally, since these corporations are not the "same taxpayer", interest netting would not apply regardless of whether the underpayments or overpayments were currently outstanding.

Given the lack of regulations, case law and Treasury Rulings on this issue, we are forwarding a copy of this opinion to our National Office for post-review. If, as a result of that post-review, there are any changes to our conclusions, we will apprise you of those changes.

If you have any questions regarding this matter, please contact Jerome F. Warner of our office at 551-5610.

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Acting District Counsel